SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

No. 74-1065

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LARRY GRAYSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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OPINION BELOW

The opinion of the Supreme Court of Illinois in this case is reported at 58 Ill. 2d 260, 319 N.E. 2d 43 (1974) and is attached hereto as Petitioner's Appendix A. The opinion of the Appellate Court of Illinois, First District, First Division in this case is reported at 13 Ill. App. 3d 1049, 301 N.E. 2d 33 (1973) and is attached hereto as Petitioner's Appendix B.

JURISDICTION

This Petition for Writ of Certiorari is filed pursuant to Title 28 U.S.C. § 1257(3) and seeks review of the judgment of the Supreme Court of Illinois entered on September 17, 1974. A Petition for Rehearing was filed with that Court on October 8, 1974 and denied on November 26, 1974.

QUESTION PRESENTED FOR REVIEW

Whether the Fifth Amendment doctrine of collateral estoppel bars a proceeding to revoke probation premised upon the same evidence presented at an earlier criminal trial of the probationer which resulted in an acquittal?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On February 21, 1969, Larry Grayson, the respondent herein and Donald Hall, entered pleas of guilty to a Cook County indictment charging them with armed robbery and both were sentenced to five years probation. Both men were thereafter indicted for the armed robbery of Thaddeus Lukas on April 9, 1970. Prior to trial, defense counsel filed a motion to suppress the identification of the two defendants, which motion proceeded to a hearing on July 20, 1970 before Judge Garippo. At that hearing the complaining witness and his brother testified. At the conclusion of the evidence, the Court stated:

> The Court: Gentlemen, I feel that the line-ups were satisfactorily conducted. However, I feel that in view of the circumstances surrounding the identification, I feel that the identification would not convince me beyond a reasonable doubt that these defendants are guilty of this offense. (A. 37)*

The Court then denied the motion to suppress. The defendants at that time waived a trial by jury and both sides stipulated that the evidence heard on the motion to suppress would be the same at trial. The court then entered a finding of not guilty as to both defendants.

On October 28, 1970, a hearing was conducted before Judge Collins on a rule to show cause why both defendants' probation should not be revoked. In support of revocation, the People presented the testimony of Thaddeus

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*"A." refers to the Abstract of Record filed in the Supreme Court of Illinois in *People* v. *Grayson*, No. 46155.

Lukas and his brother, the witnesses who had previously testified in the armed robbery case before Judge Garippo. The defendants presented no evidence other than a partial transcript of the proceedings before Judge Garippo containing the Court's conclusion (previously quoted above) that the identification testimony would not convince him beyond a reasonable doubt of the defendants' guilt. At the close of the evidence on probation revocation, Judge Collins revoked probation and sentenced each defendant to three (3) to eight (8) years in the Illinois State Penitentiary.

Both defendants appealed the probation revocation to the Appellate Court of Illinois, First District, First Division on the ground that the doctrine of collateral estoppel precluded the State from presenting evidence of the Lukas armed robbery in the probation revocation hearing following the not guilty verdict entered by Judge Garippo in the armed robbery prosecution. Rejecting this argument, the Appellate Court affirmed. *People* v. *Grayson and Hall,* 13 Ill. App. 3d 1049, 301 N.E. 2d 33 (1973).

Respondent then filed a Petition for Leave to Appeal to the Supreme Court of Illinois which was allowed. That court, considering the issue of "whether acquittal at a criminal trial precludes a subsequent revocation of probation predicated upon the same evidence which resulted in the earlier acquittal," stated:

> . . . We accordingly hold the principle of collateral estoppel applies in the circumstances present here. The acquittal of defendant on the charge of armed robbery was, under the evidence in this case, a determination that he was not one of the robbers. Once the ultimate and only disputed fact of identity had been determined by a final and valid judgment, the State could not constitutionally hale defendant before a new court in a criminal proceeding or a probation

> revocation proceeding and litigate that issue again. *Ashe* v. *Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469, 477, 90 S. Ct. 1189, 1195; *People* v. *Joyner*, 50 Ill. 2d 302, 308. (58 Ill. 2d at 265)

The Supreme Court reversed the judgment of the Appellate Court and remanded the case for such further proceedings as would be consistent with the court's opinion. The People's Petition for Rehearing was denied by the Supreme Court of Illinois on November 26, 1974.

The People of the State of Illinois present this Petition for Writ of Certiorari to review the judgment of the Supreme Court of Illinois in this case.

REASONS FOR GRANTING THE WRIT

THE DOCTRINE OF COLLATERAL ESTOPPEL EMBODIED IN THE FIFTH AMENDMENT DOUBLE JEOPARDY PROSCRIPTION DOES NOT BAR A CIVIL PROCEEDING TO REVOKE PROBATION GROUNDED UPON EVIDENCE OF A CRIMINAL OFFENSE OF WHICH THE PROBATIONER HAS BEEN ACQUITTED IN A CRIMINAL TRIAL.

In holding that the petitioner under the facts of this case was foreclosed from revoking respondent's probation on the basis of the same evidence presented at an earlier criminal trial which had resulted in a verdict of acquittal, the Court below has misconstrued this Court's opinion in *Ashe* v. *Swenson*, 397 U.S. 436 (1970) and has ignored the clearly defined scope of the Fifth Amendment double jeopardy proscription of which the doctrine of collateral estoppel is an ingredient.

Here the respondent was convicted of the offense of armed robbery and placed on five years probation. During that probationary period, respondent was charged with committing another armed robbery while on probation. At a pretrial hearing on respondent's motion to suppress the lineup identification made by the victim, Thaddeas Lukas, and Lukas' brother (an eyewitness to a portion of the crime), both witnesses testified concerning the circumstances of the crime and their subsequent identification of respondent as one of the robbers. At the close of the evidence, the trial judge overruled the motion to suppress, finding the identification procedures proper, but stated that on the identification testimony presented

he could not determine beyond a reasonable doubt that respondent and his co-defendant were guilty of the offense charged. Both defendants then waived a jury trial and a stipulation was entered that the evidence heard on the motion to suppress would be the same at trial, and the judge entered a verdict of not guilty.

Thereafter, the State proceeded with a hearing to revoke respondent's probation. The evidence presented in support of revocation was the same as that adduced at the trial for the Lukas armed robbery. Respondent offered no evidence other than a partial transcript of the proceedings from the Lukas case containing the trial judge's statement concerning the sufficiency of the identification testimony in sustaining a verdict of guilty beyond a reasonable doubt. At the close of evidence, the court found by a preponderance of the evidence that respondent had violated his probation, revoked probation and sentenced respondent to three to eight years in the Illinois State Penitentiary for the original armed robbery of which he had been convicted.

In reversing the order of revocation, the Supreme Court of Illinois found that the only issue in dispute at the trial of the Lukas armed robbery and the hearing to revoke probation was the identity of the robbers. Relying on *Ashe* v. *Swenson*, *supra*, the court held that the acquittal of respondent on the armed robbery charge constituted a finding that he was not one of the robbers and under the *Ashe* rule, barred the subsequent revocation proceeding premised upon the Lukas robbery.

In *Ashe*, this Court held that the doctrine of collateral estoppel previously applicable to federal criminal cases is embodied in the Fifth Amendment guarantee that no

person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The double jeopardy clause, by its very terms and as it has been consistently interpreted by this Court, protects the individual from repeated efforts by the government to convict him of a criminal offense. *Benton* v. *Maryland,* 395 U.S. 784 (1969); *Price* v. *Georgia,* 398 U.S. 323 (1970). And see *United States* v. *Jorn,* 400 U.S. 470 (1971). The collateral estoppel ingredient of this provision goes to one particular aspect of double jeopardy, i.e., preventing the relitigation in a criminal proceeding of issues of ultimate fact which have been adjudicated in the defendant's favor in some earlier criminal prosecution between the same parties. See, *Ashe* v. *Swenson, supra* at 443; *Turner* v. *Arkansas,* 407 U.S. 366 (1972); *Harris* v. *Washington,* 404 U.S. 55 (1971); *Simpson* v. *Florida,* 403 U.S. 384 (1971). And see *One Lot Emerald Cut Stone and One Ring* v. *United States,* 409 U.S. 232 (1972).

As an ingredient or right embodied within the double jeopardy clause, rather than a separate and distinct constitutional right, the doctrine of collateral estoppel cannot be extended beyond the scope of the Fifth Amendment guarantee in the manner adopted by the Supreme Court of Illinois in this case.

Proceedings to revoke probation are not criminal prosecutions under any rational analysis of the double jeopardy clause. Indeed, the essence of the revocation procedure is to determine the propriety of altering a sentence previously imposed after a valid and final judgment of conviction of a criminal offense, and does not involve the determination of guilt or innocence made in a criminal prosecution. See, *Berman* v. *United States,* 302 U.S. 211

(1937). The proceeding itself is substantially different than a criminal trial, *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), and does not require either proof beyond a reasonable doubt of the violation alleged or proof of conviction of another criminal offense as a prerequisite to revocation. *Burns* v. *United States*, 287 U.S. 216 (1932). And see, 18 U.S.C. § 3653. Under Illinois law, probation revocation proceedings are classified as civil in nature with a violation required to be proven by a preponderance of the evidence. *People* v. *Crowell*, 53 Ill. 2d 447. By its very nature then, probation revocation is not a criminal prosecution and need not be based upon evidence sufficient to convict. See e.g., *Burns* v. *United States, supra.*

These substantial distinctions, and in particular, the difference in the burden of proof between criminal prosecutions and probation revocation proceedings render the fifth amendment doctrine of collateral estoppel inapplicable to probation revocation hearings. As this Court noted in rejecting the application of the collateral estoppel doctrine to a civil proceeding to forfeit goods smuggled into the United States without compliance with required customs procedures following an acquittal of the criminal charge,

> "Moreover, the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel. The acquittal of the criminal charges may have only represented 'an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' *Helvering* v. *Mitchell*, 303 U.S. 391, 397, 58 S. Ct. 630, 632, 82 L. Ed. 917 (1938). As to the issues raised, it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil pro-

> ceedings." *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232, 235 (1972) (citations omitted)

Compare *Coffey* v. *United States*, 116 U.S. 436 (1886) (collateral estoppel bars civil forfeiture action following acquittal in criminal trial where statute defining the offense makes the forfeiture action a penalty upon conviction of the offense).

The validity of this distinction is quite apparent in this case. Here, the trial judge did not find that respondent was not one of the men who robbed Thaddeas Lukas. Indeed, he could not, since there is substantial testimony by the victim and his brother as to the identity of the robbers, although the victim's testimony at times is muddled, apparently due to memory lapses resulting from the beating he suffered at the time of the robbery. Rather, the court found that in his view, the testimony was not sufficient to establish *beyond a reasonable doubt* respondent's guilt. The court hearing the same evidence in the subsequent civil proceeding to revoke probation, however, had no difficulty in determining by a preponderance of the evidence, respondent's participation in violation of his probation. The subsequent revocation is not a finding of respondent's guilt of a criminal offense, but instead, is a finding that he is not a proper candidate for continuation on probation. The sentence of imprisonment imposed thereon has nothing to do with the Lukas robbery, but may only properly be determined by the nature and circumstances of the original offense of which respondent was convicted and for which he was initially placed on probation.

To equate this proceeding with the repetitious criminal prosecution barred by the double jeopardy clause as the Supreme Court of Illinois did here ignores the clear distinctions between a criminal prosecution and a proceeding to revoke probation and expands the concept of collateral estoppel substantially beyond the limits of the constitutional provision from which it is derived.

CONCLUSION

For the aforementioned reasons, the People of the State of Illinois respectfully request this Court to grant the instant Petition for a Writ of Certiorari to the Supreme Court of Illinois in this case.

Respectfully submitted,

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